IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO. 4166 OF 1997.

Koyana Educational Society & Anr..... ....
Petitioners.
V/s
Prakash Kisan Shirke & Ors.... ....
Respondents.

Smt.Anita Agarwal, Adv. For the petitioners.

Shri Uday Warunjikar, Adv. For respondent No.1.

Shri N.P.Deshpande, Adv. For respondent No.2.

Mr.S.K.Chincholikar, AGP for respondent Nos. 3 to 5.

CORAM: A.P. DESHPANDE, J.

6.6.2007.

ORAL JUDGMENT:

The petitioner is a public trust so also a Society registered under the Societies Registration Act. Petitioner No.1 administers and manages various educational institutions including the schools and colleges. Respondent No.1 was eligible and qualified for being appointed as junior clerk. Respondent No.1 came to be appointed as junior clerk with effect from 13.10.1993 vide order of appointment of the same date. It is not in dispute that the appointment order indicates that the appointment of the respondent No.1 is on probation

for a period of two years. Under the said appointment order the respondent No.1 had completed two years continuous satisfactory service. However respondent No.1 came to be terminated with effect from 6.11.1995. Aggrieved by termination the respondent No.1 filed an appeal before the School Tribunal. Respondent No.1 had contended before the School Tribunal that his appointment was in the clear vacancy and a permanent post and hence on satisfactory completion of two yeas probation period respondent No.1 has assumed confirmation and permanency by virtue of deeming fiction contained in section 5 (2) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (MEPS Act). Per contra the present petitioners who were respondents before the Tribunal had contended that there had been a mistake committed by the present petitioners while issuing order of appointment in as much as a wrong clause in the appointment order has been included. It was thus clear that the appointment order seeks appointment on probation for two years and the present petitioner claimed that that part of the appointment order was a mistake committed by the school management. The case of the present petitioner before the Tribunal was that the appointment of the respondent No.1 was subject to approval from the Education Officer and the Education Officer had approved the appointment only for one academic year i.e. 1994-95 and thus junior clerk cannot claim

permanency. It was also contended by the present petitioners before the Tribunal that as there was a backlog of reserved category in the post of junior clerk the appointment of respondent No.1 need to be construed as against a reserved post and hence the appointment needs to be construed as temporary appointment. Repelling the objections raised by the present petitioners the School Tribunal has concluded that the appointment of the present respondent No.1 was on probation for a period of two years and as the respondent No.1 has completed probation period satisfactorily he has assumed deemed confirmation and permanency by virtue of provisions contained in section 5(2) of the MEPS Act. The School Tribunal has further observed in its judgment that the Education Officer has wrongly approved the appointment from 1.12.1994 to 30.4.1995. From the averments made in this petition in the light of the documents filed at Ex.`D' and `F" its crystal clear that not only the appointment order speaks of appointment being on probation but the present petitioner had also sought approval to the appointment of the respondent No.1 on probation. The Education Officer seems to have granted the approval on probation and thereafter by communication dated 30.10.1995 Education Officer was moved for modification of the order of approval from that of probation to a temporary approval for one academic session 1994-95. The communication at Ex.D dated 30.10.1995

speaks of having received approval to the appointment of respondent No.1 on probation and further indicates that the Education Officer was requested to modify the same as the petitioners realised that there was a backlog and person from reserved category had to be appointed. The communication dated 5.11.1995 which is filed by the petitioner at Ex.F is a communication addressed by the General Secretary of the Society to the Head Master of the school wherein respondent No.1 was working. It is stated in the said communication that approval to the appointment of the respondent No.1 on probation was received from the Education Officer but as it was noticed that there was a backlog in the post of junior clerk the order was modified. It is thus clear that all throughout petitioners also believed the appointment of the respondent No.1 to be on probation and the same was also approved on probation by the Education Officer. It was only thereafter that the petitioners claimed to have realised backlog of the reserved category in the post of junior clerk, which was to be filled in and hence got the order of approval modified and converted to a temporary approval for one year i.e. academic sessions 1994-95.

2. I am in total agreement with the view taken by the Tribunal that the appointment of the respondent No.1 was on probation for a period of two years and as the respondent No.1 had satisfactorily completed the probation period the respondent No.1 had assumed confirmation.

Thus termination of respondent No.1 was illegal and unsustainable in law.

3. The learned counsel for the petitioner has invited my attention to page 30 of the petitioner being Ex.A which is a copy of an advertisement inviting applications for various posts to be filled in the school. There is a note appended which says that only candidates from SC/ST should apply. Taking support from the said advertisement the learned counsel for the petitioner submits that the post in question i.e. of a junior clerk was reserved for SC/ST which fact is borne out from the advertisement. The learned counsel for respondent NO.1 submits that the said document was not filed before the School Tribunal. He submits that even roaster was not produced before the School Tribunal and the said documents are filed in this Court for the first time. Learned counsel for the respondent relies upon categorical averments made in para 7 of the affidavit filed by respondent No.1 dated 15.10.1997 which is title as “affidavit on behalf of respondent No.1 opposing admission and interim relief”. In para 7 it is categorically averred thus:

> “7. I say that the advertisement dated 7.8.1993 as well as the roster which is produced by the petitioner before this Hon'ble Court was never produced before the School Tribunal, Kolhapur. Therefore, the petitioner should not be allowed to refer

to and rely on the advertisement as well as the roster annexed to the petition at Exhibit A and Exhibit D."

Whereas the petitioner relies upon affidavit in rejoinder dated 19.10.1997 wherein the statement made by respondent No.1 in his affidavit is denied. Record of the Tribunal is not available. As the order of appointment itself is available to indicate real nature of appointment it is not necessary to refer to the advertisement for ascertaining the terms and conditions of appointment. As the Tribunal rightly held that the appointment of the respondent No.1 was on probation nothing much turns on the advertisement.

4. Lastly it is contended by the learned counsel for the petitioner that the Education Officer was not impleaded as party-respondent before the School Tribunal and in the absence of Education Officer material documents could not be placed before the School Tribunal. It is also submitted that without Education Officer being impleded as party-respondent and without affording an opportunity of being heard extended to him, the School Tribunal has erred in criticizing the Education Officer. True it is that the Education Officer was not impleaded as party-respondent. Non-implementation of Education Officer as party-respondent cannot affect merit of the appeal for the reason that what is challenged is the order of termination issued by the management. No doubt in a given state of facts Education Officer

could be proper party to place material on record of the Tribunal and to assist the Tribunal in proper adjudication of issue involved. In the present case as the averments made in the petition clarify the position that the Education Officer had granted approval on probation which was later on modified, clears the factual position. It does appear that the order of approval passed by Education Officer initially approving appointment of respondent No.1 on probation was not served on the respondent No.1 and it further appears that on its receipt by the management it had moved the Education Officer to modify the same and the Education Officer seems to have acted as desired by the petitioners. It also appears that the order of approval has been modified without affording an opportunity to respondent No.1 of being heard in the matter. Be it as it may, perusal of the judgment of the School Tribunal brings home the fact that the respondent No.1 had assumed confirmation on completion of two years satisfactory service and thus the order of termination has been rightly held to be illegal and unsustainable in law. The judgment and order passed by the School Tribunal does not suffer from any illegality, much less patent, warranting interference in exercise of writ jurisdiction. Hence writ petition fails and is accordingly dismissed.

5. The School Tribunal while allowing the appeal granted reinstatement and 50% back wages. Respondent No.1 by filing

affidavit has claimed that respondent No.1 is unemployed and could not secure any alternate employment. There is no specific challenge to the grant of 50% back wages and I feel that the same is just and reasonable. In the result petition fails and is dismissed.

6. At this stage, learned counsel for the petitioner seeks stay of the judgment to enable the petitioner to challenge the judgment. The order passed by the Tribunal has been stayed all throughout. Hence prayer for stay of this judgment is just and reasonable and the same deserves to be favourably considered. Hence this judgment shall remain stayed for a period of eight weeks from today.